BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is printed on pages 15-16 of the record.

II.

JURISDICTION.

The character of the reasons for the Court reviewing this case on writ of certiorari falls largely within Rule 38, sub. paragraph 5 (b) of the Federal Court Rules, adopted by this Court, February 13th, 1939.

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, Title 28 U. S. C., sec. 347 (a).

III.

STATEMENT OF THE CASE.

The facts in the case have already been related in the preceding petition under Title IV, supra, pages 5-6.

IV.

ARGUMENT.

A.

PROBABLE CAUSE.

The finding of *probable cause by* the commissioner or judicial officer to whom application for a search warrant is made *should be based, not on the opinion of witnesses, but on facts set forth in the affidavit*, from which the existence of probable cause may fairly be inferred. Otherwise the conclusion would be that of the witness, and not of the judicial officer in whom alone the Constitution has vested the extraordinary power to issue search warrants, and who is thus legally charged with the duty of preventing unreasonable searches and seizures. The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause, or there

should be a hearing by him with that in view. (Espionage Act, June 15, 1917, c. 30, Title XI, sec. 4, 40 Stat. 228; 18 U. S. C. D. 614) (supra Pet. 4-5). The immunity guaranteed by the Constitution should not be lightly set aside by a mere general declaration of a nonjudicial officer that he has reason to believe and does believe, etc. The undisclosed reason may fall far short of probable cause.

In Veeder v. United States (C. C. A.), 252 Fed. 414, Baker, C. J., speaking for the Circuit Court of Appeals for the Seventh Circuit, said:

> "* * * *No search warrant shall be* issued unless the *judge has first been furnished with facts* under oath—*not suspicions, beliefs or surmises—but facts which, when the law is properly applied to them tend to establish the necessary legal conclusion*, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial question, and it cannot be delegated by the judge to the accuser."

The only allegation in the affidavit in this case that the ration coupons, etc., which were discovered by the search (the only things the search disclosed) were on the premises is the statement "That he has good reason to believe and does believe that in and upon certain premises * * *

there have been and are now located and concealed certain property used as the means of committing a felony in violation of the statutes of the United States, to-wit: Ration Order #3, Ration Order #5-C, under the Second War Powers Act, Section 100 and Section 72 under Title 18 of the U. S. Criminal Code." That this is insufficient was decided in Schencks v. United States (C. C. A., D. C.), 2 Fed. (2nd) 186, where it is said:

> "A sworn statement that a person is informed and believes, or has reason to believe and does believe, that certain facts exist, is not a positive statement that they do exist, or that they are true, and leaves no one responsible for a search or seizure, in case the information of the affiant or deponent should prove to be incorrect, or in case there should be no sound basis for his belief. If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. *If he has no first hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure*, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statement made by him to the officer.
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> "Peace officers, to their credit be it said, zealously endeavor as a rule to bring law-breakers to justice, but unfortunately they are easily satisfied as to the guilt of an accused, although having no legal evidence to convict. To permit them to search for evidence because they deposed that they *had reason to believe* and *did believe* that the law had been broken, or because they deposed that they were *informed and be-*

lieved that certain facts existed, would leave the home, the property, and the person of the citizen at *the mercy of mere suspicion*, and of misstatements, and mis-information for which no one could be held accountable. * * *.

"The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations, * * * which fail to establish probable cause, inasmuch as they state the *facts on information and belief* or *state conclusions of fact or of law, instead of positively alleging material facts* (Italics ours).

Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152.

United States v. Ray (D. C.), 275 F. 1004-1006.

Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338.

Boyd v. United States, 116 U. S. 624-630, 6 S. Ct. 524, 29 L. Ed. 746.

"To hold otherwise would reduce search warrants to the status of the old writs of assistance, and would fritter away the rights guaranteed by the Fourth Amendment, thereby giving free rein to abuses, hateful to a form of government which is intolerant of the arbitrary and irresponsible exercise of power.

"We must hold, therefore, that affidavits or depositions which simply state that the affiant or dependent *has reason to believe and does believe* that a crime has been or is in course of being committed, or which go no further than to allege conclusions of law or of fact, *or which set out on mere information and belief the material facts on which the right to search or seize is based, are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid.*" (Italics ours).

B.

(1) A SWORN COMPLAINT UPON WHICH A SEARCH WARRANT IS ISSUED UNDER THE PROVISIONS OF THE ESPIONAGE ACT (JUNE 15, 1917, C. 30, TITLE XI, SEC. 3, 40 STAT. 228; 18 U. S. C. A. 613) *MUST BE UPON PROBABLE CAUSE SUPPORTED BY AFFIDAVIT*. (Supra, Pet. p. 4).

(2) "* * * THE AFFIDAVIT OR DEPOSITIONS *MUST SET FORTH FACTS TENDING TO ESTABLISH THE GROUNDS OF THE APPLICATION* OR PROBABLE CAUSE FOR BELIEVING THAT THEY EXIST." (ESPIONAGE ACT, JUNE 15, 1917, C. 30, TITLE XI, SEC. 5, 40 STAT. 228; 18 U. S. C. A. 615) (Supra, Pet. p. 5).

(3) A MERE ALLEGATION IN THE COMPLAINT OR AFFIDAVIT THAT THE AFFIANT "HAS GOOD REASON TO BELIEVE AND DOES BELIEVE * * *" *IS NOT SUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE UPON WHICH A SEARCH WARRANT MAY ISSUE*.

The questions involved are so closely related and interlocked that they can best be argued as a single question.

Probable cause is a mixed question of law and fact. Whether the circumstances alleged to show that probable cause, or lack of probable cause, existed is a matter of fact; but whether supposing them true, the sufficiency of probable cause is a question of law. The magistrate cannot arbitrarily issue the warrant; he must require a prima facie case to be made out by some responsible person before he has any power to authorize invasion of private property.

C.

THE AFFIDAVITS AND TESTIMONY OF THE AFFIANT BEFORE THE COMMISSIONER WERE CONCLUSIONS OF FACTS BASED SOLELY UPON HEARSAY EVIDENCE AS TO THE PROPERTY TO BE SEIZED AND THE ACTS ALLEGED TO HAVE BEEN COMMITTED.

Nowhere in the affidavit is there a statement upon the personal knowledge of affiant that the ration coupons were concealed or were in anywise on the premises to be searched. There is no statement made upon the personal knowledge of affiant that the plates, dies, etc., were upon the premises (and none were found under the search warrant). The statement of the affiant "that the said M. "Doc" Bennett has knowledge and there is now concealed on his property, certain property, used as the means of committing a felony or fraud upon the Office of Price Administration, and against the peace and dignity of the United States by the use of this property, to-wit, plates, dies, etc.," is a mere conclusion of the affiant as was in *Wagner v. United States*, 8 Fed. (2nd) 581, where it is said: "In any event, the words quoted state not a fact, but a mere conclusion."

It is also noteworthy that in that case the affidavit was at variance with the search warrant.

> "It is noted further that the affidavit alleges only the possession of intoxicating liquors while the search warrant goes further, and recites the manufacture, sale and concealment of intoxicating liquors; and the warrant also authorized the seizure of stills, mash and mash tubs no one of which was mentioned in the affidavit."

The affidavit in this case is similar to that in *In Re: No. 32 East 67th Street*, 96 Fed. (2nd) 153, in which the Court said the affidavit was insufficient to show facts upon

which to base a finding of probable cause. In that case the affidavit contained the following language:

> "That in the course of his official duties he had learned that certain books, records, papers, and miscellaneous data used in connection with the above mentioned violation and certain dresses, garments, suits, hats, furs, gloves, labels and other women's wear and merchandise which were so smuggled into the United States were located in the five-story and basement building known as No. 32 East 67th Street."

In the case at bar it is to be noted that the affidavit contains language quite similar, to-wit:

> "That the said M. Doc Bennett has knowledge and there is now concealed on his property * * * plates, dies, * * *."

The Court in disposing of the motion for the return of the property used this language:

> "Relying upon the Fourth Amendment to the Constitution, the appellant contends that the search warrant was illegal because Pike's affidavit showed no facts upon which to base a finding of probable cause. Such generalities as appear in his affidavit were clearly no justification for issuance of the warrant."

D.

THE EVIDENCE BEFORE THE MAGISTRATE ISSUING THE WARRANT MUST BE COMPETENT AND MUST APPEAR IN THE SUPPORTING *AFFIDAVITS*.

This Honorable Court, in the case of *Grau v. United States*, 287 U. S. 124, 77 L. Ed. 68, 53 Sup. Ct. Rep. 38, decided (p. 40) that

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (Giles v. United States (C. C. A.), 284 F. 208; Wagner v. United States (C. C. A.), 8 F. (2d 581), and would lead a man of prudence and caution to be-

> lieve that the offense has been committed (Steele v. United States, 267 U. S. 498, 504; 45 S. Ct. 414, 69 L. Ed. 757). Tested by these standards, the affidavit was insufficient. * * *."

In *Nathanson v. United States*, 290 U. S. 41 (3rd Circuit), this Honorable Court, in reviewing a search warrant issued under a similar affidavit, at p. 46, said:

> "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."

In *Giles v. United States* (C. C. A.), 284 F. 208, (cited with approval by this Court in the Grau case supra), the Court said as follows (p. 214):

> "No lawyer would have suggested and no judge would have permitted, Lordan, testifying as a witness before a jury, to say that Giles was violating the National Prohibition Act by having illegal possession of intoxicating liquor at his drug store. He would have been required to state what he saw, or heard, or smelled, or tasted; that is, to give evidence on which the jury, under instructions of the court, could determine both as to the possession of liquor, as to whether it was intoxicating liquor, and as to whether possession of it was legal or illegal. The fact that Lordan's affidavit was not, in form, on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of the facts. It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts,

> and not his conclusion from the facts, should have been before the commissioner. Such is the plain requirement of section 5, supra."

In the instant case, the original affidavit, the testimony and the affidavit before the Commissioner incorporated in the search warrant itself were based solely upon information acquired both *oral* and *written which indicates the said M. "Doc" Bennett had obtained and was selling and offering for sale U. S. Government properties known to have been stolen from the U. S. Government*, etc., without disclosing the name or names of the informer or informers and as no witnesses or affidavits, in corroboration, were produced before the Commissioner in support of this purely hearsay evidence, as prescribed under the Espionage Act, June 15, 1917, sec. 4 (supra) (Supra, Pet. pp. 4-5), the search warrant should fall.

CONCLUSION.

Suffice to say, should the search warrant be held invalid, then it is inescapable that the conviction should be reversed on the Fourth Count of the Indictment as the proffer by the Government of the articles obtained under the search warrant before the jury were prejudicial to the Petitioner.

Respectfully submitted,

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